UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

CHAMPLIN'S REALTY ASSOCIATES	:	
v.	:	C.A. NO: 06-135 ML
DONALD L. CARCIERI, GOVERNOR OF THE STATE OF RHODE ISLAND, KENNETH K. McKAY IV, CHIEF OF STAFF TO THE GOVERNOR OF THE STATE OF RHODE ISLAND and JOHN DOES, 1 through 5	: : : : :	

OBJECTION

Now comes the Plaintiff, CHAMPLIN'S REALTY ASSOCIATES, in the above-entitled matter and hereby objects to Defendants' motion for a stay of discovery. Attached hereto is Plaintiff's memorandum in opposition to Defendants' motion for a stay of discovery.

Champlin's Realty Associates
By its Attorney,

/s/ Robert D. Goldberg
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CERTIFICATION

I hereby certify that on September 11, 2006 I electronically filed the within *Objection* with the Clerk of the U.S. District Court for the District of Rhode Island using the CM/EFC System. The following participants have received notice electronically:
Claire Richards, Esq. at crichards@gov.state.ri.us

/s/ Robert D. Goldberg

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CHAMPLIN'S REALTY ASSOCIATES :

v. : C.A. NO: 06-135 ML

DONALD L. CARCIERI, GOVERNOR :
OF THE STATE OF RHODE ISLAND, :
KENNETH K. McKAY IV, CHIEF OF STAFF :
TO THE GOVERNOR OF THE STATE OF :
RHODE ISLAND and JOHN DOES, 1 through 5 :

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OBJECTION TO STAY OF DISCOVERY

The defendants have moved for a stay of discovery claiming the protections of a state created remedy—Rhode Island's anti-SLAPP statute, chapter 33 of title 9 of the General Laws, "Limits on Strategic Litigation Against Public Participation", and a claim of qualified immunity based on their status as government officials. These claims are inapposite. In their memorandum to this Court, defendants allege that they are before this Court as citizens who have exercised "their right of free speech under the United States or Rhode Island constitutions" and that this speech "relates to matters of 'public concern.'" On the other hand, defendants have raised a defense of qualified immunity, claiming, that as government officials (as opposed to private citizens); they are protected from litigation by a litigant such as Champlin's, that alleges a violation of its constitutional rights. Not only have defendants asserted contradictory defenses, plaintiff will demonstrate that neither is applicable to this case involving a violation of a citizen’s rights to due process.

Section 1983 of title 42 of the United States Code (42 USC § 1983), creates a federal cause of action for violations of rights secured by the United States Constitution. It provides in relevant part:

> “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

The claims against these defendants are simple and straightforward: Champlin's alleges that defendants Carcieri and McKay worked in concert and with others in order to defeat its application for a marina expansion. Specifically, plaintiff contends that the defendants interfered with a quasi-judicial proceeding by contacting members of the CRMC over whom defendant Carcieri had appointment authority and, in the case of CRMC member Sullivan, hiring and firing authority, and directed them to vote against Champlin's application. Further, plaintiff has cause to believe that defendants solicited other intermediaries to contact members of the CRMC in an effort to defeat its application.

Champlin's has alleged and the discovery obtained thus far will show that defendants held meetings with CRMC chairman Michael Tikoian (Tikoian) and

CRMC staff with the intent to defeat Champlin's application and to "unlawfully influence the members to vote against plaintiff's application."

Champlin's contends that this conduct was in violation of its right to procedural and substantive due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 2 of the Constitution of Rhode Island. See Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662 (1986) (Due Process Clause is intended to secure protections from arbitrary state action and bars certain actions regardless of the fairness of the procedures used to implement them).

Additionally, Champlin's has asserted a state tort claim and alleged that by seeking to influence the vote of the CRMC against its application defendants are liable for the malicious interference with its prospective contractual relations. See L.A. Ray Realty v. Town Council of Town of Cumberland, 698 A.2d 202, 207 (R.I. 1997) (Elements of a claim of interference with prospective contractual relations are "'(1) the existence of a business relationship or expectancy, (2) knowledge by the interferor of the relationship or expectancy, (3) an intentional act of interference, (4) proof that the interference caused the harm sustained and (5) damages to the plaintiff.'" Id. (quoting Mesolella v. City of Providence, 508 A.2d 661 669 (R.I. 1986).

The plaintiff has not alleged any issue involving "the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances" as described in the state's anti-SLAPP statute.[1] The conduct alleged in this case involves clandestine meetings and communications between defendants Carcieri and McKay

[1] The plaintiff notes that defendants are state actors—they have no right to petition themselves for redress of grievances. As such, G.L. § 9-33-1 et seq has no applicability to the case at bar.

(and John Does to be named later as discovery develops) and members of the CRMC, including its chairman, with the intent to achieve a result adverse to the interests of the plaintiff. This conduct, if proven, does not approach constitutionally protected speech.

The plaintiff has expended in excess of $500,000 in furtherance of its quest for a minimal expansion of its marina. Champlin's marina is located in Type III waters—specifically designated by the CRMC for marinas and moorings. Champlin's sought a 240 foot expansion from its existing marina. The CRMC subcommittee, which heard the testimony, voted 3-1 to recommend an expansion of 170 feet (subcommittee recommendation). The discovery unearthed so far reveals that after the close of evidence and before the subcommittee vote, Tikoian caused a plan for an expansion of 100 feet to be prepared and attempted to inveigle the members of the subcommittee to vote in favor of this mysterious plan.[2] The discovery also establishes that members of the subcommittee were approached by Tikoian or CRMC staff (presumably at his direction) and urged to vote in favor of the 100 foot plan. This plan was not in evidence and had never been disclosed to plaintiff, yet, three days after the subcommittee vote, Tikoian and CRMC staff members presented a power point demonstration of this plan to the defendants in the Governor's office. The details of this meeting are awaiting a resolution of a motion to compel.

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[2] It should be noted that the genesis of this plan is the subject of a motion to compel more responsive answers pending before this Court—during a deposition of CRMC staff employee Danni Goulet, CRMC counsel directed asserted "the deliberative process privilege" a remarkable procedural ploy, with absolutely no supporting case law, designed to avoid answering questions and producing documents pursuant to a valid federal witness subpoena. This is currently the subject of a motion to compel more responsive answers pending in this Court.

Additionally, Tikoian, who was not a voting member of the subcommittee and had no role in that portion of this quasi judicial proceeding, saw to it that defendant Carcieri was briefed about the Champlin's application by Paul Lemont, the subcommittee chairman, while the evidentiary hearings were on-going—the details of this “briefing” have not yet been uncovered.

Further, Mark Adelman, a member of the governor’s policy office, contacted Tikoian on November 5, 2004 asking Tikoian to “have someone send me the info on the town’s position and the groups for and against the expansion.” Tikoian warned Adelman that “as the CRMC is quasi-judicial, the agency must be cognizant of the legal ramifications of appeal.” Adelman responded that “[t]his is done with every department that has regulatory functions.”[3] See attached Exhibit A. As will be shown at trial, Tikoian’s worries about “the ramifications of appeal” were short lived.

In an affidavit filed by CRMC member Jerry Sahagian, Sahagian testified that prior to the vote of the full CRMC on February 28, 2006, he was informed by fellow CRMC member K. Joseph Shekarchi that Tikoian was in communication with the Governor’s office throughout that day seeking to have him replaced as a member of CRMC in order to prevent him from participating in the vote of the full council. The substance of these discussions has yet to be explored.

Accordingly, as these facts demonstrate, none of the allegations in Champlin's complaint even remotely impact Rhode Island’s anti-SLAPP statute—there is simply no First Amendment implication in this case. Moreover, nothing in this case gives rise to a stay of discovery based on qualified immunity.

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[3] This evidence, along with disturbing revelations from members of other state boards and commissions may lead to a finding of a custom, pattern, practice or policy by the state.

THE ANTI-SLAPP STATUTE

The so-called anti-SLAPP statute, chapter 33 of title 9 of the General Laws affords protections for the exercise of free speech.

> "The anti-SLAPP statute was enacted to prevent vexatious lawsuits against citizens who exercise their First Amendment rights of free speech and legitimate petitioning by granting those activities conditional immunity from punitive civil claims." Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 752 (R.I. 2004).

This enactment was not intended to protect the state or its agents from intentional violations of a citizen's constitutional rights. Additionally, because defendants have failed to comply with the procedural requirements of the statute, the anti-SLAPP defense is not available

By its terms, the anti-SLAPP statute provides for burden shifting at several critical stages. First, the statute comes into play solely when an issue of free speech or the right of petition is implicated in the civil action for which the defendant claims the protections of the statute. Only then does the burden shift to the plaintiff to prove "that such conduct is a sham to defeat an anti-SLAPP defense." Id. at 753. Thus, the defendant has the burden of establishing that the suit against it is the result of an exercise of his or her rights of free speech or the right of petition. These defendants have failed to do so and cannot do so. This suit is not about the free speech rights of the governor of the state or (incredibly), his right to petition the government for redress. The claim in this case is that the Governor, by and through his agents, intentionally sought to deprive Champlin's of its right to due process by directing CRMC members, over whom he had appointment authority, and hiring authority, and directing them to vote against the project. Viewed in any light, this conduct is not protected by the constitution. Thus, notwithstanding its dubious viability in the context of a federal civil rights action, the anti-SLAPP statute has no applicability to the case at bar.

QUALIFIED IMMUNITY

In their memoranda in support of a stay of discovery and summary judgment, defendants have raised the defense of qualified immunity as a bar to this action. Citing Macone v. Town of Wakefield, 277 F.3d 1, (1st Cir. 2002), defendants contend "that there is no constitutionally-cognizable property interest in obtaining an approval from the CRMC for a development project." The defendants have missed the point; Champlin's has alleged it was denied due process by state actors and that their interference with the process resulted in damages. [4] Champlin's has not sued for a loss of a mere expectancy—it has complained because it was denied a fair hearing by these defendants, acting under color of law and in concert with others. Furthermore, this conduct occurred after the subcommittee recommended a 170 foot expansion of its

[4] Champlin's acknowledges that this issue is the subject of an appeal pursuant to G.L. 42-35-15, the Administrative Procedures act, which is a continuation of the administrative hearing process. That proceeding however, is not an adequate post-deprivation remedy because it cannot compensate plaintiff for the damages incurred as a result of the constitutional violations it has sustained due to defendants' conduct; nor can it restrain any further constitutional violations, one of the claims for relief sought herein.

existing marina.[5] In any civil rights claim, the first inquiry "is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws of the United States.'" Jolicoeur Furniture Co. v. Baldelli, 653 A.2d 740, 749-50 (R.I. 1995) (quoting Baker v. McCollan, 443 U.S. 137, 140 (1979)). Fairness in the state's tribunals, judicial or, in this case, quasi-judicial, is certainly a right protected by the constitution. The Due Process Clause clearly protects against "certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Zinermon v.Burch, 494 U.S. 113, 125 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986).

The Supreme Court has recognized that government officials are entitled to limited immunity from damage claims "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Champlin's submits that attempting to influence the result in a quasi-judicial proceeding in the manner alleged in this case, violates clearly established constitutional rights of the plaintiff. Champlin's submits that the defendants in this case do not enjoy immunity from suit in the circumstances of this case.

[5] Champlin's notes however that having secured a favorable recommendation from the CRMC subcommittee after 28 evidentiary hearings spanning in excess of 3000 transcript pages, it was vested with a constitutionally protected right to have that recommendation decided by a CRMC that was not infected by the defendants' improper influence. The plaintiff submits that its due process interest in a fair procedure ripened into a property interest once it obtained a favorable vote from the subcommittee.

DISCOVERY SHOULD CONTINUE

In spite of a detailed pre-trial order in this case, plaintiff's attempts to obtain discovery has been vigorously rebuffed by non-party witnesses. The CRMC has taken the extraordinary position that it enjoys a "deliberative process privilege" designed to shield the CRMC staff from giving testimony. This issue is currently pending before this Court. The Town of New Shoreham, not a party to this litigation, has interposed an objection to giving testimony based on its view about the merits of this controversy. Champlin's has had to seek the intervention of this Court at every turn. It is obvious that these witnesses are reluctant to testify in this case and tell us what they did.

Notwithstanding the foregoing, the limited discovery that has been completed, has revealed extensive wrongdoing by the defendants. Discovery should continue.

Champlin's Realty Associates
By its Attorney,

/s/ Robert D. Goldberg

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